IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 2

UNITED STATES OF AMERICA,

Petitioner,

—against—

BERNARD W. COBLENTZ, *et al.*,

Respondents.

BRIEF OF RESPONDENT NEW YORK UNIVERSITY IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of Mr. Justice Gold of the Supreme Court of the State of New York, New York County, is unreported but is set forth on page 23 of the Record on Appeal to the Court of Appeals of the State of New York.

The memoranda decision of the Appellate Division, First Department, of the Supreme Court of the State of New York affirming the order of the Supreme Court, New York County (R. 32-33), is reported at 4 App. Div. (2d) 869 (10) and that granting leave to petitioner to appeal to the Court of Appeals (R. 30-31) is reported at 4 App. Div. (2d) 947 (23).

The opinion of the Court of Appeals by Judge Dye affirming the order below is reported at 5 N. Y. (2d) 300, and it is set forth at pages 13 through 31 in the Appendix to petitioner's brief.

Jurisdiction

The judgment of the Court of Appeals was entered on March 5, 1959 (Appendix, petitioner's brief, pages 32-33). By order of Mr. Justice Harlan, dated June 1, 1959, the time for filing a petition for a writ of certiorari was extended to and including July 31, 1959. The petition for a writ of certiorari was filed on July 30, 1959. Jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1257(3).

Questions Presented

I. Where New York State statutory and judicial law give to respondent New York University a portion of an award for the condemned property of a taxpayer, can such portion of the award be considered property of the taxpayer and available to the lien of the Government to satisfy its tax claim?

II. Does a taxpayer have any property interest to which a Government lien for taxes can attach in that portion of a condemnation award which it has assigned, before the Government lien was filed, to an attorney for services?

Statutes Involved

The only statutes involved are those set forth on pages 2-3 of petitioner's brief.

Statement

On August 5, 1955, the City of New York, pursuant to an order entered by the Supreme Court of New York County, acquired title by condemnation to the area known as Washington Square Southeast in New York City, for purposes of slum clearance and redevelopment, pursuant to Title I of the Federal Housing Act of 1949, as amended. On the aforesaid August 5, 1955, the City of New York conveyed the premises 55 West 3rd Street together with other properties which constitute the Educational Area of the Washington Square Southeast Slum Clearance Project to New York University, as required by an agreement between the University and the City of New York. Said property was conveyed to the University to be cleared of all existing buildings, and thereafter to be improved with educational facilities.

Tailored Contour, Inc., prior to August 5, 1955, was a tenant at the second floor of said premises 55 West 3rd Street and subsequent to said date continued in possession of the premises as a tenant of New York University. Upon failure of Tailored Contour, Inc. to pay rent in arrears owed the University, summary proceedings were instituted in the Municipal Court of the City of New York, First District, and the University recovered judgment against Tailored Contour, Inc. in the amount of $920. This judgment was duly entered on May 23, 1956, in the office of the Clerk of that Court.

On May 23, 1956, the District Director of Internal Revenue filed in the office of the Register of New York County a notice of federal tax lien on the property

of Tailored Contour, Inc. in the aggregate amount of $8,436.78, including interest, for taxes assessed in May, August and November, 1955.

On March 8, 1954, Tailored Contour, Inc. had retained Bernard W. Coblentz, Esq. to represent it in the condemnation proceedings and had made an assignment to him of 20% of any fixture award made to it.

The final decree in the condemnation proceedings entered on September 25, 1956, in the Supreme Court, New York County, determined that the value of the condemned fixtures and property of Tailored Contour, Inc. was in the amount of $6,056., including interest. Said decree, however, made the amount of the award to be paid to Tailored Contour, Inc. subject to the aforementioned judgment for use and occupation in favor of New York University as required by Section B15-37.0 of the Administrative Code of the City of New York. The Government did not appeal the entry of the final decree or contest its provisions.

On January 28, 1957, Coblentz moved the Special Term of the Supreme Court, New York County, for an order adjudging that his claim and lien for legal services in the amount of $1,211.20 be a prior and first lien against the fixture award made to Tailored Contour, Inc. and that the balance of the award be subject to the tax claim of petitioner (R. 10-13).

New York University and the United States of America both appeared and opposed said motion. New York University contended that its claim was prior to that of the Government (R. 18-20), while the Government maintained that its claim was a lien prior to that of the University and of Coblentz (R. 20-22).

The Court granted the petition of Bernard W. Coblentz, Esq. to the extent that his lien was held prior to that of the United States Government, but held the judgment claim of New York University to be superior to both claims and a prior lien against the award (R. 5-7 and 23). Petitioner appealed this order to the Appellate Division of the Supreme Court, First Department, which affirmed, without opinion, the order of the Supreme Court (R. 32-33). Pursuant to application by petitioner, the Appellate Division granted it leave to appeal to the Court of Appeals and certified a question of law to that Court.

The Court of Appeals affirmed the judgment below holding that New York University was entitled to first priority since state law (the Administrative Code of the City of New York, Section B15-37.0) reduced the property interest of Tailored Contour, Inc. in the fixture award by a reasonable amount for use and occupation; and moreover, that the final decree, as a further expression of state law, specifically made the award subject to the rent claim of the University. Therefore, only the diminished award was the property interest of Tailored Contour, Inc. available to the Government's lien.

As to Coblentz, the Court held that the attorney's lien was entitled to priority over that of petitioner by virtue of the fact that Tailored Contour, Inc. had divested itself of a portion of the condemnation award in executing the retainer agreement, and consequently, only the balance was its property interest available to the Government's lien, and further that Coblentz was a purchaser within the meaning of Section 6323 of the Internal Revenue Code of 1954 (Appendix, petitioner's brief, pages 13-28).

ARGUMENT

I.

With respect to the question of the priority of the lien of respondent New York University the decision of the Court below does not warrant further review.

(a) It Is Not In Conflict With The Decision of This Court or of Any Other Court.

Petitioner at page 11 of its brief concedes that no such conflict exists.

(b) It Presents No Issue of General or Immediate Importance.

The claim of respondent New York University is in the modest amount of $920 which has already been paid to it by the condemnor, the City of New York. It arises from facts peculiar to the instant case and it is most unlikely that a similar combination of law and fact will recur in the future. Consequently, it cannot be said that the question presented is of substantial general importance to the legal community or to the nation at large. Furthermore, the small sum of money involved and the singular nature of the case make it largely one of academic interest to the parties themselves.

(c) It Is Clearly Correct.

The basis of the opinion of the Court below is apparently misunderstood by petitioner. The opinion

of the Court of Appeals in holding that New York University had a prior lien against the condemnation award was predicated on the fact that state law, as expressed by the terms of the final decree in the condemnation proceedings and by Section B15-37.0 of the Administrative Code of the City of New York, reduced the property right of Tailored Contour, Inc. in the condemnation award by the amount of the rent claim of the University. That decree is binding upon petitioner who had adequate opportunity to appeal therefrom; having failed to do so it cannot now engage in a collateral attack (*Cocke* v. *Halsey, et al.*, 41 U. S. 71).

The Court therefore held that it was only the property interest as so reduced which the taxpayer owned and which was available to the lien of the Government (putting aside the question of the Coblentz claim). Since the creation of the property rights of a taxpayer for tax purposes is recognized as a matter of state law (*United States* v. *Bess*, 357 U. S. 51), the statement of those rights by the highest tribunal of the State of New York binds this Court. (*Clarke* v. *Clarke*, 178 U. S. 186.)

The theory of "relating back", which the petitioner deprecates in its brief at page 11 has not heretofore been advanced or considered by any of the courts below and admittedly has no relationship to the present case.

The decision of the Court of Appeals is founded upon principles of law which have been correctly and reasonably applied and is clearly without error.

II.

The entire decision below should not be reviewed as it raises no novel issue, is not directly in conflict with other decisions and is correct in legal principle.

The relationship of federal lien law and existing state property rights has been considered by this Court in a relatively large number of cases, and certiorari has been granted in two additional cases to be heard during the present term.[1] The principles controlling the instant case are no different from those applicable to the two cases scheduled for review. There is no reason why the limited and valuable time of this Court should be taken by still a third case in the same general area.

Petitioner contends that the present case is in conflict with *U. S.* v. *Pay-O-Matic Corp.*, 162 F. Supp. 154 (S. D. N. Y.), aff'd. 256 F. (2d) 581 (2d Dist.), cert. den. 358 U. S. 830, motion for leave to file petition for rehearing out of time denied, 359 U. S. 985. However, the Court of Appeals expressly stated in its opinion that ". . . there is a clear difference in this case and Pay-O-Matic" (Appendix petitioner's brief, page 26). As the Court pointed out, aside from the fact that both cases were in different courts and sought to review different claims, in the *Pay-O-Matic* case the attorney's retainer was executed after the condemnation order, while in the instant case it pre-

[1] *Aquilino* v. *United States*, 1958/1959 Term, Case No. 132, cert. granted, Feb. 24, 1959, case below 3 NY (2d) 511 and *United States* v. *Durham Lumber Co.*, 1958/1959 Term, Case No. 579, cert. granted, Feb. 24, 1959, case below 257 F. (2d) 570 (4th Cir.).

cedes it. Consequently, on August 5, 1955, the title vesting date, Tailored Contour's property claim against the City was the value of its fixtures condemned less the amount of the assignment made to Coblentz (putting aside the claim of respondent New York University). It was only this lesser property interest which was subject to the Government's lien. In *Pay-O-Matic* this was not the case; consequently the decision below was properly decided.

CONCLUSION

The petition for certiorari should be denied or, if granted, should review solely the question of the relative priority of the attorney's lien and petitioner's tax lien.

Respectfully submitted,

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